No. 12556

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
vs.
SHIRLEY DOORES, et al,
Defendant,
EDWARD H. TEED,
Intervenor and Cross-Petitioner-Appellee.

No. 12556

On Appeal from the District Court of the United States, for the Eastern District of Washington

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BRIEF FOR THE APPELLANT

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INDEX

TABLE OF CASES

MISC.

STATUTES

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STATEMENT OF JURISDICTION

This action was brought in the District Court of the United States for the Eastern District of Washington, Northern Division, pursuant to the provisions of Sec. 852 of Title 28, U. S. C. A., now Sec. 2042 in Revision. Judgment was entered on the 21st day of February, 1950 (Tr. 16, 17) and Notice of Appeal was filed on April 19, 1950, (Tr. 17, 18). This Court has jurisdiction under Sec. 1291 of the revised Title 28, U. S. C.

STATEMENT OF THE CASE

On or about September 1, 1949, Edward H. Teed, intervenor and cross-petitioner-appellee herein, filed a petition in intervention to recover the sum of $5,950 held in the registry of the District Court for the Eastern District of Washington. The petition was heard by the Hon. Sam M. Driver, Judge of the above District Court, on or about October 14, 1949, without a jury. Judgment was entered on or about the 21st day of February, 1950, directing the Clerk of Court to pay to Edward H. Teed, the appellee, the said sum of $5,950.

STATEMENT OF FACTS

On or about December 12, 1944, in the District Court for the Eastern District of Washington, Shirley Doores, George Clayton and Edward Kelly were duly convicted of conspiring to extort money from Dr. Edward H. Teed, the appellee herein. The evidence upon which Shirley Doores and the others were convicted was essentially as follows:

Dr. Edward H. Teed, in 1944, was a practicing physician at Coeur d'Alene, Idaho. Shirley Doores had on a number of occasions secured narcotic drugs from Dr. Teed for a fictitious individual by the name of Mike Sanders. She had also procured narcotics prescriptions for herself, although she was known by the doctor to be an addict. Shirley Doores, Clayton and Kelly decided to take advantage of the unlawful issue of narcotics prescriptions. It was agreed by the three of them that Kelly would pose as one W. J. Graben, a Federal Narcotic Officer, stationed at Seattle. It was part of the general plan that, posing as such narcotic officer, Kelly would journey to Coeur d'Alene and

advise Dr. Teed that he was checking on the prescriptions issued to Mike Sanders.

On or about April 10, 1944, Shirley Doores and Kelly went to Coeur d'Alene. Shirley went to Dr. Teed's office. After about ten minutes' delay, Kelly followed her there. In Shirley Doore's presence Kelly made known to Dr. Teed that he was W. J. Graben and that he was investigating the sale of narcotics to Sanders. Kelly also advised Dr. Teed that he had a warrant for the doctor's arrest in his pocket but said he would not serve it until the following day. He also waved what purported to be his credentials in the direction of the doctor.

After Kelly left the doctor's office, Shirley Doores returned and stated to Dr. Teed that she had spoken to Graben and that Graben could be "fixed" for $2,500. That same day Dr. Teed paid that sum to Shirley Doores.

On April 17, 1944, Shirley Doores again contacted Dr. Teed and demanded $1,500, which she said was necessary to pay another Federal narcotic officer and the clerk in the narcotic office. She also demanded a quantity of narcotics. At that time Dr. Teed paid her the $1,500 and gave her 100 tablets of morphine, 50 grains of codein and 100 tablets of dilaudid, as requested.

On April 12, 1944, she again reappeared in Dr. Teed's office in Coeur d'Alene and demanded $3,500 more to pay off some of the other Federal narcotic officers. Dr. Teed paid her this amount. She suggested to Dr. Teed at this time that he leave town for at least several days to permit conditions to quiet down. As a result of this suggestion, Dr. Teed spent some time at Hailey, Idaho, purportedly on a vacation trip, from

whence he was again called back to Coeur d'Alene by Shirley Doores.

On April 20, 1944, as a result of a telegram received by him at Hailey, Idaho, Dr. Teed returned to Coeur d'Alene. Shirley Doores advised him by phone that very serious complications had arisen and that, if these matters were not straightened out before April 22, he might be arrested. Teed immediately drove to Spokane, where he saw Shirley Doores personally concerning the matters discussed over the phone. In his presence, Shirley made what purported to be a long distance call to Graben at Seattle and after the call was completed she advised Teed that an additional $6,500 was required to hush a Mr. Bangs, Chief Narcotic Inspector at Seattle, along with a large quantity of narcotics for Graben. That evening Dr. Teed paid Shirley $3,000 in cash. The balance of $3,500, plus the narcotics, was given to Shirley on April 24.

The conspirators' downfall came about as a result of the greediness of Shirley Doores and her refusal to divide any of her ill-gotten gains with the other conspirators. She informed Kelly that she had only received $600 from Dr. Teed, when in truth and fact she received over $14,000. Kelly became suspicious and went directly to Dr. Teed's office at Coeur d'Alene and, still posing as Graben, demanded additional sums of money from Dr. Teed. Dr. Teed, realizing that Shirley had not used the $14,000 he had given her for the bribing of Graben and Bangs, immediately called the police and all the conspirators were arrested.

At the time of the arrest of the conspirators a search warrant was procured by the United States Attorney directed against the safe deposit box of Shirley Doores in The Old National Bank of Spokane. As a result of the issuance of this warrant the sum of $5,950 in

currency was found by the United States Marshal in that deposit box. A list of the serial numbers of this currency, which was in $10, $20 and $50 bills, was admitted in evidence at the criminal trial as being a portion of the monies extorted from Dr. Teed.

On or about the 12th day of September, 1946, the District Court for the Eastern District of Washington duly and regularly entered an order directing the United States Marshal to deposit said sum of $5,950 into the registry of the Court under Title 28, U.S.C.A., Sec. 851. The money was so deposited by the Marshal.

It should also be pointed out that Dr. Edward H. Teed was thereafter convicted of a narcotics violation in the State Court of Idaho, such violation consisting of the unlawful sale of narcotics to Shirley Doores and the fictitious prescriptions to Mike Sanders.

On or about the 1st day of September, 1949, Dr. Teed petitioned for the return of the $5,950 in the registry of the Court on the basis that said sum was the property of the petitioner and procured from him by Shirley Doores by means of "threats, duress, fraud, extortion, and blackmail" and that he was entitled to the return of said monies under Title 28, U. S. C., Sec. 2042.

The judgment entered on the 21st day of February, 1950, by the Hon. Sam M. Driver, District Judge for the Eastern District of Washington, held that the said Edward H. Teed was entitled to the return of said sum of $5,950. It is from this judgment that this present appeal is taken.

QUESTIONS PRESENTED

1. Whether the Court was justified from the evidence in this case in making Finding of Fact No. 4 (Tr. 15), which was as follows:

"That Edward H. Teed, who paid the money, and Shirley Doores, who received it, are not in pari delicto and Edward H. Teed had no intention of bribing or attempting to bribe a Federal narcotics agent until he was coerced and deceived by Shirley Doores, as stated above."

2. Whether the Court was justified from the evidence in this case in making Finding of Fact No. 6 (Tr. 15), which was as follows:

"That Edward H. Teed has been convicted and punished for violation of the Idaho State Narcotics Laws for his conduct in connection with this transaction. His punishment has been severe since he has been deprived of his right to practice his profession as physician, and the withholding of Edward H. Teed's money from him would in practical effect amount to an additional fine of $5,950 for his six-year old transgressions."

3. Whether the Court was justified from the evidence in this case in making Conclusion of Law No. 1 (Tr. 15), which was as follows:

"That Edward H. Teed, the cross-petitioner herein, is the legal owner of and is entitled to the possession of said sum of $5,950 held in the registry of the court."

4. Whether the Court was justified from the evidence in this case in making Conclusion of Law No. 2 (Tr. 15), which was as follows:

"That under Sections 2041 and 2042 of Title 28, U. S. C., the cross-petitioner, Edward H. Teed, is entitled to withdraw from the registry of the court the said sum of $5,950."

5. Whether the Court was justified from the evidence in this case in making Conclusion of Law No. 3 (Tr. 16), which was as follows:

"That neither public policy nor the equities of the case require the withholding of the said sum of $5,950 from Edward H. Teed, cross-petitioner."

6. Whether the Court was justified from the evidence in this case in making Conclusion of Law No. 4 (Tr. 16), which was as follows:

> "That the petition of cross-petitioner, Edward H. Teed, must be granted."

7. Whether or not the Court erred in making its judgment ordering and directing the return to Edward H. Teed, as intervenor and cross-petitioner-appellee, the sum of $5,950 now held in the registry of the Court.

STATUTES INVOLVED

The Statutes involved in this case are 2041 and 2042, Title 28, United States Code, formerly sections 851 and 852 of Title 28, U. S. C. A., and are set forth in the Appendix.

DESIGNATION OF POINTS TO BE URGED

1. Appellant respectfully urges that there was no evidence to support the trial court's finding of fact that appellee and Shirley Doores were not in a pari delicto relationship each to the other.

2. Appellant respectfully urges that the trial court was in error in determining as a matter of law that appellee was entitled to the return of said monies where the crime of attempted bribery has been committed against the Government and said monies seized by the Government as evidence of that unlawful purpose.

3. Appellant respectfully urges that the Court was in error in considering the amount or extent of past punishment in determining whether or not appellee was entitled to the return of the monies here involved.

SUMMARY OF ARGUMENT

The appellee, Dr. Teed, to avoid apprehension and arrest for the unlawful sale of narcotics, paid the sum of $5,950 to one Shirley Doores with the intent and purpose that said money be used by her to bribe Federal narcotic officers. The money was appropriated by Shirley Doores for her own use. It was seized from her possession by a United States Marshal, acting under a lawfully procured search warrant, as evidence in an extortion charge against Shirley Doores and others in the Federal District Court and deposited by the Marshal in the registry of the court under Section 851 of Title 28, U. S. C. A., now Section 2041, Title 28, U. S. C.

It is the position of the appellant that, from the above resume of facts, it is apparent that both appellee and Shirley Doores were in the relationship of pari delicto. It is the further position of appellant that there is no evidence in this cause upon which the Judge, as a trier of fact, could have found that such relationship did not exist.

It is the further position of this appellant that where money has been so paid on an illegal agreement, a malum in se agreement, and the relationship of pari delicto exists, the law will assist neither of them in recovering money so paid, whether it be from each other or from the United States Government which is in legal posssession of such tainted funds and against which the crime was committed; that as a matter of public policy the law will leave the parties to such transaction as it found them and give neither aid nor comfort to either of them.

It is the further contention of the appellant that the fact that appellee has already been subjected to punishment for his crime should not be considered by the

Court as a basis for the return of the monies here involved.

ARGUMENT

It should be pointed out for the assistance of this Court that the present appeal is a civil matter arising out of a criminal case. The entire transcript of record in the criminal case, by agreement of counsel for both appellant and appellee, was admitted by the Court as an exhibit (Tr. 36). That transcript is designated herein as Exhibit 2 and appellant in the course of this argument will refer to portions thereof and in particular to the testimony of Dr. Teed, appellee, as contained therein.

Pari Delicto

As heretofore stated, it is appellant's contention that the trial court was in error in determining as a finding of fact that the appellee and Shirley Doores were not in the relationship of pari delicto to each other. It is the further contention of this appellant that there is no evidence from which the trial court could have determined as a finding of fact that such relationship did not exist.

The appellee, Dr. Teed, testified as a witness for the Government in the criminal conspiracy case against Shirley Doores and others in which he was the victim. His testimony in the previous criminal case is submitted by the Government as proof that there is no evidence in the instant case upon which the trial court could find as a finding of fact that the relationship of pari delicto did not exist between the appellee and Shirley Doores. The appellee admitted that he knew that there was a Federal narcotic agent in Seattle by the name of "Graven" or "Graben" (Ex. 2, p. 239).

Appellee admitted that he gave the money here involved to Doores for the express purpose of escaping criminal prosecution.

> "Q. Why were you giving her all of this money?
> A. Well, it was hush money.
> Q. What, if anything, did the possibility of your being (123) arrested and prosecuted have to do with your giving her this money?
> A. That was why I gave it to her in the first place, to keep from being prosecuted.
> Q. Will you state whether or not you believed she was turning it over to the various narcotic agents of the Treasury Department?
> A. Yes, sir; I thought she was.
> (Ex. 2, p. 204)

Further:

> "Q. What further did she report to you or say to you at that time after the 'phone call, what did she say that Graven had said?
> A. That he had to have $6,500 more.
> Q. What did she say it was for?
> A. To hush the narcotic agent in Seattle by the name of Bangs.
> Q. Bangs, the Chief Inspector?
> A. Yes, sir. (128)
> Q. She used Mr. Bang's name?
> A. Yes, sir."
> (Ex. 2, p. 208)

In substance the appellee throughout his entire testimony and without exception fully acknowledged that he intended the monies paid to Shirley Doores, of which the $5,950 here sought is a portion, to be paid to her for the sole purpose of bribing two narcotic agents of the Treasury Department situated at Seattle, Washington, and thus escape prosecution for the unlawful sale of narcotics to Shirley Doores and others.

Pari delicto is defined in Bouvier's law dictionary, page 2454, as follows:

"In a similar offense or crime; equal in guilt or legal fault."

The rule, as contended by the appellant, is well stated in *12 Am. Juris.* 213, pages 725, 726, 727, as follows:

"Generally, however, in cases in which the parties are in pari delicto, the courts not only refuse to enforce rights arising out of an executory illegal agreement, but even where the agreement has been executed in whole or in part by one of the parties, as, for instance, by the payment of money, the courts, notwithstanding the other has received the benefit thereof without giving anything in return, generally refuse to give relief, unless, as will be seen, the former repudiates the agreement before the execution of the unlawful purpose. Moreover, the general rule is that neither party to an agreement that has been executed on both sides will be aided in recovering what he has parted with under the agreement. Thus, where money has been paid on an illegal agreement, it is a general rule that if the agreement is executed and the parties are in pari delicto, neither can recover from the other the money so paid. * * * *Money paid to suppress a threatened prosecution for a crime cannot be recovered back.*"

The above rule was applied in *Clark v. United States,* 102 U. S. 322 at page 331, wherein the Supreme Court held that money paid to bribe an officer of the United States placed the claimants and the money they corrupted in pari delicto and that, accordingly, the claimants could not recover back from him the money they paid nor from the United States after it was seized from a dishonest official.

The rule is similarly stated in *United States v. Thomas,* 75 F. (2d) 369 and in *United States v. Connoughton,* 39 F. (2d) 237.

The Supreme Court of the State of Washington has universally held that no action can be based upon an illegal contract or one that is against public policy by a party in pari delicto. See *Miller v. Myers,* 158 Wash., 643; 291 Pac. 1115. The same rule is announced in the recent case of *Armitage v. Hogan*, 25 Wash. (2d) 672; 171 Pac. (2d) 830.

The trial court, in its written opinion in this case, announced that it found the appellee, Dr. Teed, "guilty of attempted bribery" (Tr. 11). In addition, it should be remembered that Dr. Teed was actually convicted in the State Courts of Idaho for a narcotic violation arising out of the dispensation of narcotics to Shirley Doores. This Court will take judicial notice that under the Harrison Narcotic Act the appellee could have been charged with a similar narcotic violation in Federal District Court.

The appellant, therefore, respectfully urges that the relationship of pari delicto was conclusively established by the testimony of Dr. Teed himself wherein he admitted illicit traffic in narcotics and admitted the intent to bribe a Federal officer to escape apprehension; by the trial court's declaration in its opinion that Teed was guilty of attempted bribery; by the arrest and subsequent conviction of Teed in the Idaho State Court.

The establishment of the relationship of pari delicto, therefore, makes necessary the application of the rule contended for by the Government, namely, that parties in pari delicto as a matter of public policy may not maintain an action for the recovery of tainted funds.

Crime Against the Government

It is respectfully urged by the appellant that the trial court was in error in determining as a matter of law

that appellee was entitled to the return of said money where the crime of attempted bribery has been committed against the Government and said money seized under search warrant by the Government as evidence of that unlawful purpose.

It is appellant's contention that appellee is not entitled to maintain an action for the recovery of the money here involved for the reason that the monies were used by him in the perpetration of a crime against the Government as that principle is announced in the case of *United States v. Galbreath*, 8 F. (2d) 360, a District Court case of the Northern District of California. In the *Galbreath* case the defendant assisted a prohibition agent by the name of Caveny in the performace of his duties. The defendant was not an officer of the United States. In the course of assisting Caveny the defendant asked for and received from petitioner the sum of $300 which was given to defendant and accepted by him as a bribe to prevent petitioner's arrest for a violation of the National Prohibition Act. Both men were arrested and the money was taken from defendant's possession by another Government agent. Defendant was convicted of extortion. The petitioner sought the return of the $300 on the ground that it was his money. The Court denied the petition for the return of said money in the following language:

> "It is sufficient to say that in the case at bar it affirmatively appears that defendant represented, and petitioner intended and believed, that Caveny, who in fact was a de jure officer, was to share in the money in question. Petitioner, therefore, was guilty at least of an attempt to commit bribery, if not of that crime itself. It is of course unthinkable that a court of justice will assist in the recovery of property voluntarily surrendered under such circumstances."

It will be noted that the *Galbreath* case is identical to the case at bar. In the instant case Dr. Teed, appellee, was found guily by the court of the crime of attempted bribery (Tr. 11). The appellee, as petitioner herein, "intended and believed" that both Graben and Bangs were in fact de jure narcotic officers and were to share in the money which he paid to Shirley Doores (Tr. 204-208). The money was taken from Shirley Doores's possession by another Government agent and after having been admitted in evidece in the extortion case, was duly deposited in the registry of the court. Shirley Doores was convicted of conspiracy to extort said money. It is submitted that it is likewise "unthinkable that a court of justice will assist appellee in the recovery of property under such circumstances."

The trial court in the case at bar admitted in his opinion that the above *Galbreath* case was the only cited case squarely in point. He stated that although it was entitled to consideration as persuasive authority, he was not bound to follow it and he declined to follow it (Tr. 12).

It is strenuously urged by appellant that the rule as laid down in the *Galbreath* case should not be discarded. As a matter of public policy the Court should not intervene to extricate persons who have implicated themselves through acts malum in se from their plights. The cases of *Second Russian Insurance Company v. Miller,* 268 U. S. 552 and *Marshall v. Lovell,* 19 F. (2d) 751, c. d. 276 U. S. 616, are authority for the above rule and are followed in main by every court in the land. It is quite evident that the appellee in this case was victimized because he had been in the business of illegally peddling narcotics, a business which is certainly malum in se. To permit the return of such monies to appellee is to return to him the tools which

he used in the perpetration of his crime. Such permit does not only transcend public policy and justice but serves to encourage crime.

Nor should this Court be concerned with the fact that no bona fide Government official ever received a portion of the bribery monies. Dr. Teed intended unequivocally that said monies should be paid to both Graben and Bangs who were then and now are bona fide narcotic officers situated in Seattle, Washington. The fact that Teed was misled by Doores and his effort to bribe Federal officers was unsuccessful should not put him in a better position than he would have been in had the persons whom he intended to corrupt actually been officials of the United States.

Past Punishment

Finally, it is appellant's contention that the Court should not have considered the amount or extent of past punishment sustained by appellee in determining whether or not the appellee was entitled to the return of the monies here involved. That such consideration was given by the Court is shown by the opinion of the Court (Tr. 11), by Finding of Fact No. 6 (Tr. 16), and by Conclusion of Law No. 3 (Tr. 16). The Court said further in its opinion that, among other things, the appellee has been deprived of the right to follow his profession. There is no evidence that he has actually been deprived of that right, but in any event the question of whether he is legally entitled to the return of these monies should not be tempered with the consideration of sufficiency of punishment. We think this requires no citation of authority.

CONCLUSION

The judgment of the trial court entered on the 21st day of February, 1950, should be reversed and judgment should be entered on behalf of the Government denying the petition of appellee for the return of the sum of $5,950 now in the registry of the District Court for the Eastern District of Washington.

Respectfully submitted,

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APPENDIX

Title 28, United States Code:

Section 2041. Deposit.

All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.

This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

Section 2042. Withdrawal.

No money deposited shall be withdrawn except by order of court.

In every case in which the right to withdraw money deposited in court has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the persons entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.